

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts

DTE 01-31

**COMMENTS OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
IN SUPPORT OF THE ATTORNEY GENERAL'S REQUEST TO COMPEL VERIZON
MASSACHUSETTS TO PRODUCE THE CLEC 2001 REPORT,
OR, IN THE ALTERNATIVE,
TO STRIKE TESTIMONY OF WILLIAM E. TAYLOR**

AT&T Communications of New England, Inc. ("AT&T") submits these comments in support of the Attorney General's request that the Department of Telecommunications and Energy (the "Department") compel Verizon Massachusetts ("Verizon") to provide the relevant pages of the CLEC Report 2001 identified in Verizon's supplemental reply to Information Request AG-VZ 4-11, and requested by the Attorney General in AG-VZ 1-8 and again in AG-VZ 2-2. In his direct testimony, William E. Taylor relies upon the CLEC Report 2001 to support his contention that RCN is an "effective competitor" in Massachusetts.¹ AT&T also requests that the information relied upon by Verizon, and provided only to the Department, on the number of wholesale services RCN purchases from Verizon ("RCN wholesale data") be made available

¹ *Direct Testimony of William E. Taylor*, D.T.E. 01-31 (April 12, 2001) at 10, lines 1-3. Verizon Response to AG-VZ 1-8, D.T.E. 01-31 (July 5, 2001).

to the parties subject to appropriate protective treatment.² Alternatively, AT&T supports the Attorney General's motion to strike the testimony of William E. Taylor to the extent it relies on the CLEC Report 2001 and RCN wholesale data to support Verizon's claim that sufficient competition exists to warrant the removal of price regulation.

Argument

I. VERIZON SHOULD NOT BE ALLOWED TO RAISE OBSTACLES TO USE BY OTHER PARTIES OF INFORMATION VERIZON RELIES UPON TO JUSTIFY ITS ALTERNATIVE REGULATION PLAN.

A. Verizon Inappropriately Asserts a Copyright Objection to the Provision of Data It Relies Upon To Advance Its Position in This Proceeding.

Verizon relies on the CLEC Report 2001 to support its claim that that RCN is an effective competitor in Massachusetts and that RCN can "sustain price advantages in offering end-use customers some highly attractive integrated communications packages."³ Verizon's failure to produce the relevant pages of this document prevents AT&T and other CLECs from conducting a full evaluation of the evidence underlying the conclusory assertions in Verizon's testimony, as well as the figures and quotations Verizon provides from the CLEC Report 2001 in its replies to AG-VZ 1-8 and 4-11. Only with the text of the Report can an assessment be made of Verizon's reliance on these numbers to support its proposal for deregulation.

Verizon's refusal to provide the requested pages of the CLEC Report 2001 on the basis of copyright protection is an extraordinary reach that is inconsistent with long standing practice at the Department. Should the Department sustain Verizon's objection on copyright grounds, the Department's ability to review documents and efficiently conduct proceedings would be

² *Direct Testimony of William E. Taylor*, D.T.E. 01-31 (April 12, 2001) at 10, lines 1-3. Verizon Response to AG-VZ 1-8, D.T.E. 01-31 (July 25, 2001).

³ *Direct Testimony of William E. Taylor*, D.T.E. 01-31 (April 12, 2001), at 10.

seriously undermined. Under Verizon's reasoning, for example, AT&T would be required under the copyright laws to object to the Department's request for the economic journal articles relied upon by John Mayo in his direct testimony.⁴ The use of copyrighted materials by the Department and parties in the context of regulatory proceedings certainly does not exploit a copyright holders' monopoly privilege to use a work for private commercial gain. In addition, use of copyrighted material in the context of litigation arguably qualifies as "fair use" under the copyright law.⁵ Application of the fair use doctrine entails consideration of all of the evidence of fair use, including but not limited to the factors enumerated in the copyright statute.⁶ Taking into account that the requested materials here, the CLEC Report 2001, will be used solely for litigation purposes and that its use may be so limited by protective order or protective agreement, the Department should deny Verizon's obstructionist objection and require that the relevant pages be made available for full use in the proceeding. Sustaining Verizon's refusal to produce materials on the grounds of potential copyright violations would set a dangerous precedent that

⁴ DTE-ATT 1-1, D.T.E. 01-31 (September 19, 2001).

⁵ 17 U.S.C. § 107 states:

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

⁶ Nimmer on Copyright, § 13.05 ("...the factors contained in Section 107 are merely by way of example, and are not an exhaustive enumeration.") (citations omitted).

will inevitably undermine the Department's ability to conduct proceedings that frequently rely on the use of copyrighted material in the record.

B. Verizon Should Not Be Permitted To Rely On Information Obtained By Virtue of Its Incumbency While At the Same Time Refusing to Produce That Information.

In addition to the CLEC Report 2001, Verizon relies upon another source of data to support its contention that RCN is a viable competitor in Massachusetts. Verizon uses its position as the incumbent local exchange carrier to compile data on the number of wholesale services that RCN purchases from Verizon.⁷ In its testimony, Verizon therefore takes advantage of the knowledge it has by virtue of its incumbency to support its claim that sufficient competition exists to justify deregulation. Verizon now refuses to provide the parties in this proceeding with the RCN wholesale data, while at the same time Verizon seeks to use the RCN wholesale data to argue conclusions about competition in Massachusetts markets. Like Verizon's past refusal to provide information about the carriers who list numbers in the E911 database and the services those carriers provide, Verizon is again refusing to provide information it exclusively has by virtue of its position as the incumbent local exchange carrier at the same time that it seeks to use that information to demonstrate that sufficient competition exists to justify deregulation. Such one-sided use of information by Verizon is yet another example of the "myriad of potential actions by the incumbent [which] may be utilized to delay the emergence of competition."⁸

⁷ A G-VZ 1-8(a), D.T.E. 01-31 (July 5, 2001).

⁸ Dr. John Mayo's Response to DTE-ATT 2-4, D.T.E 01-31 (November 30, 2001) (asking: "See p. 14, lines 13-15: According to Mr. Mayo's testimony, [T]he vertically integrated firm may have incentives to delay, deny, or denigrate the emergence of competition of the retail stage offering. Please explain what ILEC behaviors are contemplated here, and how they may be employed to delay the emergence of competition, deny the emergence of competition, and denigrate the emergence of competition.")

If Verizon relies upon information that it obtains from third parties, it is incumbent on Verizon to make the appropriate arrangements with those third parties to ensure that such information can be subjected to investigation in the proceeding. If Verizon fails to make those arrangements, it should not be able to report its essentially unreviewable conclusions here.

II. ALTERNATIVELY, THE TESTIMONY OF WILLIAM E. TAYLOR SHOULD BE STRICKEN BECAUSE VERIZON CANNOT SUPPORT ITS USE OF THE CLEC REPORT 2001 AND RCN WHOLESALE DATA TO JUSTIFY DEREGULATION.

Should Verizon not provide the requested pages of the CLEC Report 2001 or the RCN wholesale data to participating parties willing to be bound by appropriate restrictions, the testimony of Dr. Taylor which relies on the CLEC Report 2001 and RCN wholesale data is an unsupported conclusory assertion and must be stricken.

Conclusion

For the reasons stated above, AT&T respectfully requests that the Department grant the Attorney General's motion to compel the production of the relevant pages to the CLEC Report 2001 cited in response to AG-VZ 1-8, 2-2 and 4-11. AT&T also requests that the information that Verizon compiled from its own internal sources regarding RCN's purchase of wholesale services be provided to the other parties in this proceeding subject to appropriate protection. In the alternative, AT&T requests that the Department strike the testimony of William E. Taylor to

the extent that it relies on the CLEC Report 2001 and RCN wholesale data to support Verizon's request for deregulation.

Respectfully submitted,

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